BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AARON L. THOMAS	)	
Claimant	)	
V.	)	Docket No. 1,067,015
	)	
GENERAL MOTORS, LLC	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of Administrative Law Judge Steven J. Howard's November 18, 2013 preliminary hearing Order. Zachary A. Kolich of Shawnee Mission, Kansas, appeared for claimant. Karl L. Wenger of Kansas City, Kansas, appeared for self-insured respondent (respondent).

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the November 12, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

The preliminary hearing Order indicated claimant's accident is not compensable because claimant's fall was a neutral risk, not a risk associated with his employment.

Claimant requests the Order be reversed. Claimant argues his accident was the result of or related to the ill-maintained property, which was directly within the area utilized by employees to enter and exit the facility for respondent's benefit. Claimant further argues the premises exception to the coming and going rule applied because he was still on respondent's premises when the accident occurred. Respondent maintains the Order should be affirmed.

The issues for the Board's review are:

(1) Did claimant's injury arise out of and in the course of his employment?

(2) Is claimant entitled to medical benefits, reimbursement of unauthorized medical expenses and temporary total benefits?

FINDINGS OF FACT

Claimant has worked for respondent for over 16 years. Claimant puts away materials delivered from trucks and restocks materials as they are pulled. In approximately August 2012, he was assigned by respondent to work at Oakland Logistics, an offsite facility.

On August 5, 2013 around 6:40 a.m., claimant's shift ended and he was done with his work. He exited the building through a door used by employees only and was walking toward his vehicle in the employee parking lot. The general public did not use this door. Claimant was not paying attention and slipped and fell. When claimant lost his footing and fell, he heard a pop and felt an immediate acute, sharp pain in his left ankle. Claimant testified he slipped on wire mesh or grating that was over a bare spot in the grass.[1] The mesh may have been made of metal or plastic, claimant was not sure.

He was carrying a bag containing his cutting utensils and orange vest, but testified the bag did not contribute or cause him to fall. While a sidewalk was available to use from the building to the parking lot, claimant was not prohibited from going across the grass to get to the parking lot. Subsequent to the accident, a sign was erected indicating employees should keep off the grass.

The area of grass was not covered by leaves or snow at the time of the accident. Claimant testified the area where he fell was "worn fairly well"[2] and had been since February 2013. He knew the grass was bare in the area he was walking and acknowledged there was nothing new that was unusual the day he fell, in terms of the area of his fall. Claimant generally worked five or six shifts a week and testified he crossed such area every day on his way to and from work.[3]

One of the supervisors, "Dan," was present immediately after the fall and witnessed claimant lying on the ground. Dan called 911 and an ambulance transported claimant to KU Medical Center, where claimant received x-rays, pain medication, a leg brace and prescription for crutches. He was diagnosed with a fractured ankle and instructed to follow-up with his physician. Claimant saw Dr. Jesse Cheng, the company doctor, who referred him to Dr. Aakash Shah, an orthopedic surgeon.[4]

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[1] P.H. Trans. at 5, 8, 18; see also Resp. Ex. C.

[2] *Id.* at 14.

[3] *Id.*, Resp. Ex. B.

[4] *Id.*, Cl. Ex. 1 at 6.

Claimant was first seen by Dr. Shah on August 15, 2013. Dr. Shah took claimant entirely off work. After this visit, claimant received a letter denying his claim. On October 29, 2013, claimant was released by Dr. Shah to return to work with restrictions of no lifting over 40 pounds, no prolonged standing, no prolonged squatting and no climbing ladders. Dr. Shah continued to have claimant use the leg brace throughout treatment, but discontinued the crutches. From October 29, 2013, forward, claimant has worked full-time, accommodated duty. At the time of the preliminary hearing, claimant was still wearing his leg brace.

On October 22, 2013, claimant was seen at the request of his attorney by Edward Prostic, M.D. Dr. Prostic noted claimant's fractured left ankle was not completely healed and claimant should continue treating with Dr. Shah. Dr. Prostic opined the work-related injury was the prevailing factor of the injury, the medical condition, and the need for medical treatment.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 states, in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A)The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

. . .

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The rationale for the going and coming rule is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[5]

McCready analyzes various risks: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character.[6] Under the post-May 15, 2011 law, neutral risks are no longer compensable. "Unexplained falls at work are neutral risks."[7] "[A]n unexplained fall while walking is a hazard to which the worker would have been equally exposed apart from the employment."[8]

ANALYSIS

Claimant was still on the premises when he fell. While claimant was assigned by respondent to work at an offsite facility, this Board Member agrees with other Board Members who have twice concluded the term "premises" includes an area where the employer assigns an employee to perform work.[9]

This Board Member does not view the facts of this case as requiring the same result reached in *Laturner*.[10] In such case, Laturner slipped and fell on ice and snow while taking a cigarette break. A Board Member concluded there was no link between Laturner's personal desire to smoke and the conditions under which her work was to be performed. The Board Member further noted falling on ice and snow was not shown to be a risk associated with Laturner's employment. The instant case does not involve the personal comfort doctrine. Unlike the ice and snow in *Laturner*, the instant case does not contain evidence claimant also faced the risk of slipping and falling on wire, mesh or grating apart from the nature, conditions, obligations and incidents of his employment.

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[5] *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[6] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 88, 200 P.3d 479 (2009).

[7] *Id.* at 81; see also pp. 92-93.

[8] *Meyer v. Nebraska Furniture Mart*, No. 107,424, 286 P.3d 576 (unpublished Kansas Court of Appeals opinion filed Oct. 12, 2012).

[9] *Moran v. Arnold & Assoc. Of Wichita*, No. 1,064,968, 2013 WL 5521852 (Kan. WCAB Sept. 10, 2013); *Harris v. Comfort Keepers*, No. 1,058,976, 2012 WL 1652981 (Kan. WCAB Apr. 30, 2012).

[10] *Laturner v. Quaker Hill Nursing, LLC*, No. 1,059,381, 2012 WL 6101119 (Kan. WCAB Nov. 1, 2012).

This case is most similar to *Robles*,[11] in which a claimant clocked out of work and was walking to her vehicle through respondent's parking lot when she stepped on a piece of hose, sustaining a right ankle injury. The Board Member deciding *Robles* held claimant's accident arose out of and in the course of her employment, and her accident did not arise out of a neutral risk or as a result of a normal activity of day-to-day living.

A neutral risk encompasses a situation where there is no explanation for the cause of the accident, i.e. it is neither personal to the claimant nor caused by the employment.[12] Here, claimant's accident was not unexplained. Claimant slipped and fell on plastic or metal mesh, wiring or grating. He was exposed to such risk as a result of his employment. There is no evidence claimant was equally exposed to such risk apart from his assigned work.

CONCLUSIONS

This Board Member concludes:

(1) claimant's accidental injury arose out of and in the course of employment; and

(2) claimant's requests for temporary total disability and medical benefits are issues for Judge Howard to address on remand.

DECISION

WHEREFORE, the November 18, 2013 preliminary hearing Order is reversed on the arising out of and in the course of employment issue and remanded for determination of claimant's requests for temporary total disability and medical benefits.[13]

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

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[11] *Robles v. Braums, Inc. #103*, No. 1,061,870, 2013 WL 485718 (Kan. WCAB Jan. 23, 2013).

[12] See *McCready*, 41 Kan. App. 2d at 92 ("This was truly a neutral risk. Neither party could explain the reason for McCready's fall. Getting out of the car did not cause her injury such as in *Martin* and *Anderson*. Standing up from a chair did not cause her disability as in *Johnson*. McCready was on the premises coming back to work and, giving deference to the Board's view of the facts, her disability does not arise from some personal condition. The risk should therefore be borne by Payless as the Board concluded.").

[13] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

HONORABLE JOHN F. CARPINELLI
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Honorable Steven J. Howard